Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

PEZOLD, RICHEY, CARUSO & BARKER,

Petitioner,

v.

THE CHEROKEE NATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an Indian tribe's assertion of sovereign immunity insulate the tribe from court-imposed sanctions for the tribe's misconduct during the litigation?

PARTIES TO THE PROCEEDING

Petitioner

Pezold, Richey, Caruso & Barker is a partnership of professional corporations. These professional corporations have no parent companies or subsidiaries.

Respondent

The Cherokee Nation is a federally recognized Indian tribe.

Cherokee Nation Industries, Inc., an Oklahoma corporation wholly owned by the Cherokee Nation, and Cherokee Nation Enterprises, an Oklahoma corporation wholly owned by the Cherokee Nation, and Terry J. Barker, an individual, were parties to the district court action, but not to this proceeding.

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Petitioner, Pezold, Richey, Caruso & Barker ("PRC&B"), respectfully requests that a writ of certiorari be issued to review the decision of the Oklahoma Court of Civil Appeals, Division III, in this case.

OPINIONS BELOW

The Opinion of the Oklahoma Court of Civil Appeals, Division III ("Court of Appeals"), is reported at *Pezold, Richey, Caruso & Barker v. Cherokee Nation Industries, Inc.*, 18 P.3d 364 (Okla. 2000). (App. A.) In that Opinion, the Court of Appeals reversed the unreported Judgment of the district court. (App. B.)

STATEMENT OF JURISDICTION

The Court of Appeals issued the Opinion on September 1, 2000. A timely petition for rehearing was denied by the Court of Appeals on September 29, 2000. (App. C.) The Oklahoma Supreme Court denied a timely petition for certiorari on January 9, 2001. (App. D.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution provides in relevant part: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes. . . ." U.S. Const. art. I, § 8, cl. 3.

STATEMENT OF THE CASE

The sole issue in this appeal is whether an Indian tribe can engage in misconduct before a trial court with impunity if claims against it are later dismissed because of tribal sovereign immunity. The issue turns on a question of first impression concerning which doctrine — a court's inherent power to enforce its orders or the doctrine of tribal sovereign immunity — takes precedence when the two doctrines come into conflict. The district court ruled that it had the inherent power to sanction the Cherokee Nation ("CN") for undisputed acts of misconduct, regardless of the tribe's assertion of sovereign immunity. The Court of Appeals reversed the district court, holding that this Court's decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), protected the tribe from the consequences of its sanctionable conduct. The Court of Appeals' Opinion involves an unwarranted extension of this Court's decision in *Kiowa*. The Court of Appeals' decision gives an Indian tribe *carte blanche* to commit sanctionable conduct and strips the courts of any power to punish such conduct. Certiorari should be granted to allow this Court to resolve this question of first impression and correctly define the parameters of tribal sovereign immunity.

A. The Proceedings Below

PRC&B brought this action in the state district court to recover fees owed to PRC&B from its representation of CN in various commercial matters. *Pezold, Richey, Caruso & Barker v. Cherokee Nation*, 18 P.3d 364, 365 (Okla. 2000). CN, which is a federally recognized Indian tribe, moved to dismiss the case for lack of subject-matter jurisdiction, asserting tribal sovereign immunity. *Id.* The district court

denied this motion based on Oklahoma law as it existed at the time. *See First Nat'l Bank v. Kiowa, Comanche & Apache Intertribal Land Use Comm.*, 913 P.2d 299, 301 (Okla. 1996); *Aircraft Equip. Co. v. Kiowa Tribe*, 921 P.2d 359, 361-2 (Okla. 1996); *Hoover v. Kiowa Tribe*, 909 P.2d 59, 61-62 (Okla. 1995). In these decisions, the Oklahoma Supreme Court had held that the state courts of Oklahoma had concurrent jurisdiction with tribal courts to decide claims involving commercial agreements between Indian tribes and non-Indians.

During discovery in the action, the district court sanctioned CN for concealing or destroying relevant documents sought by PRC&B. *Pezold*, 18 P.3d at 365. After CN had been sanctioned, this Court decided the case of *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). The *Kiowa* case reversed the earlier Oklahoma law on which jurisdiction over CN had been based. *See Carl E. Gungoll Exploration v. Kiowa Tribe*, 975 P.2d 442, 445 (Okla. 1998) (overruling prior Oklahoma law because of *Kiowa*). CN renewed its earlier motion to dismiss for lack of subject-matter jurisdiction, and PRC&B agreed to the dismissal without prejudice of its substantive claims based on the change in Oklahoma law caused by the *Kiowa* case. *Pezold*, 18 P.3d at 365. But PRC&B contended, and the district court agreed, that the district court retained the inherent power to sanction CN for misconduct while before the district court, regardless of whether subject-matter jurisdiction over the substantive claims ultimately existed. *Id.*

CN appealed. CN did not contest that its conduct warranted sanctions and did not dispute the amount of the sanctions. The only basis for its appeal was the argument, based primarily on the *Kiowa* case, that sovereign immunity precluded the imposition of sanctions for its misconduct.

The Court of Appeals agreed with CN. The Court of Appeals held that when a court's inherent powers are in conflict with the doctrine of tribal sovereign immunity, tribal sovereign immunity takes precedence, relying on the *Kiowa* case. *Id.* at 366. As a result, the Court of Appeals held that the district court had no authority to sanction CN for its misconduct, and reversed the judgment. *Id.* PRC&B's timely petition for certiorari to the Oklahoma Supreme Court was denied. (App. D.)

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN A COURT'S INHERENT AUTHORITY AND THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

The Court of Appeals held that when a court's inherent supervisory authority comes into conflict with a claim by an Indian tribe of sovereign immunity, tribal sovereign immunity takes precedence and insulates the tribe from sanctions for its misconduct. This ruling disregards the policies underlying the two doctrines and creates a situation in which a tribal litigant can commit misconduct with impunity.

A court's inherent supervisory authority to issue sanctions and to enforce its orders against litigants has been explicitly recognized by this Court, and this line of cases has been adopted by the Oklahoma courts. In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court held that there is a " 'well-acknowledged' inherent power of a

court to levy sanctions in response to abusive litigation practices." *Id.* at 765 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962)); *see also Chambers v. Nasco, Inc.*, 501 U.S. 32, 35 (1991) (inherent power to sanction exists in addition to powers created by statute). *Roadway* was later adopted by the Oklahoma Supreme Court as authoritative for the Oklahoma courts. *See Helton v. Coleman*, 811 P.2d 100, 102 (Okla. 1991); *Winters v. City of Oklahoma City*, 740 P.2d 724, 726-7 (Okla. 1987). The Oklahoma district court thus had the inherent power to impose sanctions arising from " 'the control necessarily invested in courts to manage their own affairs' so as to achieve the orderly and expeditious disposition of cases." *Id.* at 726 (quoting *Link*, 370 U.S. at 630).

When the action was originally filed in the district court, there was no conflict between a district court's inherent authority and the doctrine of tribal sovereign immunity under then-existing jurisprudence in Oklahoma. In a series of cases, the Oklahoma Supreme Court had held that sovereign immunity did not preclude jurisdiction over tribes engaged in commercial dealings outside of "Indian country." *See First Nat'l Bank*, 913 P.2d at 301; *Aircraft Equip. Co.*, 921 P.2d at 359; *Hoover*, 909 P.2d at 61-62. While the present case was pending before the district court, however, this Court held that an Indian tribe may claim sovereign immunity in a purely commercial matter involving activities outside Indian country, and this decision was then applied by the Oklahoma Supreme Court. *See Kiowa*, 523 U.S. at 759; *Carl E. Gungoll Exploration*, 975 P.2d at 445. The parties then agreed that the substantive claims should be dismissed based on these new decisions.

Kiowa did not expressly address the issue of whether tribal sovereign immunity took precedence over a court's inherent supervisory authority. The Court of Appeals, however, inferred from *Kiowa* that tribal sovereign immunity extended to insulate an Indian tribe from sanctions for litigation misconduct. The decisions of this Court confirming a court's inherent supervisory authority thus came into direct conflict with the doctrine of tribal sovereign immunity.

CN does not dispute that it committed acts that would have entitled the district court to sanction ordinary litigants. It claims, however, that the inherent supervisory power of the district court cannot reach CN because of tribal sovereign immunity. The Court of Appeals agreed, relying on a decision by the United States Court of Appeals for the First Circuit, *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994). In *Horn*, the court addressed the authority of a federal district court to sanction the federal government for prosecutorial misconduct. The First Circuit held that when the inherent supervisory power of the district court conflicted with the doctrine of sovereign immunity, "[w]e believe that sovereign immunity ordinarily will trump supervisory power in a head-to-head confrontation." *Id.* at 764. Relying on *Horn*, the Court of Appeals held in this case that CN could engage in misconduct with impunity because the substantive claims in the case were ultimately dismissed based on tribal sovereign immunity. *Pezold*, 18 P.3d at 366.

The decision in *Horn* should not have been applied to this case. First, *Horn* involved misconduct by the federal government before a federal court. The First Circuit's grounds for its decision — the possible depletion of federal funds, the analogy with state sovereign immunity, and the separation of powers between the judiciary and the executive

branches — are simply inapplicable to the present situation. *See Horn*, 29 F.3d at 765-7. Second, applying *Horn* to the present situation was contrary to public policy. This Court has recognized that implicit in the existence of a judicial system is the power of a court to require parties before it to refrain from abusive litigation practices and to "manage their own affairs' so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). But the effect of the Court of Appeals' decision is to strip the courts of this inherent authority to enforce their rulings and punish misconduct by certain parties, in clear conflict with the teaching of *Link* and *Wabash*. Under the Court of Appeals' decision, an Indian tribe may engage in the most egregious misconduct — including the destruction of evidence — and the courts are powerless to prevent or punish it.

The petition for certiorari should be granted to address this conflict between the two doctrines of inherent judicial authority and tribal sovereign immunity. The conflict presents a pure question of law that has not previously been addressed in any case identified by the parties. The sole case identified in the appeal as addressing the conflict between inherent authority and sovereign immunity is factually dissimilar, because it involved the conflict between the authority of a federal district court and the federal government's sovereign immunity. Furthermore, the question is clearly one of substance. Because of the many Indian tribes now engaged in commercial and other activities outside of "Indian Country," the issue is one that is likely to recur, and this case presents a valuable opportunity for the Court to provide guidance to the lower courts.

II.

THE PETITION SHOULD BE GRANTED TO CORRECT AN UNWARRANTED EXTENSION OF THIS COURT'S OPINION IN *KIOWA*.

The Court of Appeals' decision was based on an extension of the *Kiowa* case that was so broad as to eliminate any authority of the courts to punish misconduct by an Indian tribe that appears before them. Nothing in *Kiowa* warranted this extension of tribal sovereign immunity, and certiorari should be granted to define the proper parameters of the doctrine.

In *Kiowa*, the Court noted that the doctrine of tribal sovereign immunity is a judicially created doctrine that "developed almost by accident." 523 U.S. at 756. While the Court recognized that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," the Court chose not to limit the doctrine out of deference to Congress, which " 'has always been at liberty to dispense with such tribal immunity or to limit it.' " *Id.* at 759 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991)). As a result of these considerations, the Court was unwilling to draw a distinction between commercial and governmental activities of a tribe for purposes of tribal sovereign immunity. *Id.* at 754-5.

None of the grounds for decision in the *Kiowa* case apply in the present case. The doctrine of inherent judicial authority is, like tribal sovereign immunity, a judicially created doctrine. Nothing in *Kiowa* suggests that this Court has defined tribal sovereign immunity so broadly that it eliminates or reverses the Court's prior decisions recognizing

a court's inherent authority to punish misconduct by parties before it. Nor is there any ground for asserting that Congress has intended, either overtly or by inaction, to allow Indian tribes to commit sanctionable acts in the courts with impunity.

Furthermore, the Court of Appeals' extension of the *Kiowa* case puts the courts in an intolerable situation when waiver of sovereign immunity becomes an issue. As *Kiowa* expressly recognized, an Indian tribe may waive sovereign immunity so as to subject itself to state-court jurisdiction. 523 U.S. at 754. Under the improper extension of *Kiowa* in this case, however, if a tribe chooses to conceal or destroy the documents containing that waiver, a state court is powerless to impose sanctions for destruction of the very documents that, if produced, would prove that the court had jurisdiction. By disregarding this Court's decisions concerning a court's inherent authority and extending Indian sovereign immunity well beyond any previously recognized bounds, the Court of Appeals has made it impossible for the courts to manage issues of waiver and sovereign immunity. The inherent power of a court to sanction a party for abusive litigation practices remains fundamentally necessary for the orderly management of a court system, even if there is a possibility that the court may ultimately lose jurisdiction.

This Court has previously recognized the necessity of courts retaining the ability to sanction parties for misconduct despite a later loss of jurisdiction. In a closely analogous case, *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), this Court held that sanctions could be imposed on a party under Federal Rule of Civil Procedure 11 even when the district court was later held to be without subject-matter jurisdiction. *Id.* at 139. In *Willy*, the plaintiff was sanctioned for abuse of

the litigation process. The case was then remanded to state court after it was determined that there was no federal subject-matter jurisdiction. The Court noted that

> [a] final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. *But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under a misapprehension that it had jurisdiction.*

Id. at 137 (emphasis added). The *Willy* decision held that a court's authority to decide issues collateral to the merits and its "interest in having rules of procedure obeyed . . . does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction." *Id.* at 139. Accordingly, this Court upheld the imposition of sanctions even when subject-matter jurisdiction was ultimately lacking. *Id.*

There is an exact parallel between *Willy* and the present case — the district court was under a "misapprehension that it had jurisdiction" over the substantive claims against CN based on commercial activities outside of "Indian country." After the *Kiowa* case was decided, it was clear that there was no such jurisdiction over the substantive claims in the case. But the ultimate loss of jurisdiction should have had no effect on the district court's authority to punish CN for misconduct that occurred while the court believed it had jurisdiction. The Court of Appeals' overbroad reading of *Kiowa* disregarded the important policy grounds supporting a court's inherent authority, grounds that remain applicable even if a court ultimately loses subject-matter jurisdiction.

CONCLUSION

The Oklahoma Court of Appeals' ruling misapplied this Court's decision in *Kiowa*, and thereby stripped the courts of the authority to punish otherwise sanctionable conduct. This unwarranted extension of tribal sovereign immunity is contrary to the decisions of this Court recognizing a court's inherent authority to manage litigation before it and to respond to abusive litigation tactics. Because this case presents a significant legal question of first impression and provides an opportunity to give the lower courts guidance as to the extent of tribal sovereign immunity, the petition for certiorari should be granted.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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